Horst Koch v Michael Schaefer

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1-22-101 OF 1996
MOHD NOOR AHMAD J
4 NOVEMBER 1997

Civil Procedure *— Appeal — Right of appeal to High Court — Non-compliance with order on security for costs — Whether plaintiff has right of appeal to judge in chambers — Rules of the High Court 1980 O 56 r 1*

On 30 January 1997, in the absence of the plaintiff and his counsel, the senior assistant registrar ('the SAR') made an order requiring the plaintiff to deposit into court a sum of RM150,000 as security for costs, within 20 days from the date of the order and directed that all proceedings in the action be stayed until the deposit is made ('the order'). The plaintiff then filed an application to set aside the order or alternatively, for the order to be stayed until the disposal of the application. The SAR dismissed the application but extended the period for compliance for another 14 days and confirmed the order. The preliminary issue was whether the court can proceed to hear the appeal in the face of the order made by the SAR which the plaintiff had not complied with.

Held, dismissing the preliminary objection:

The plaintiff has a vested right of appeal to the judge in chambers by virtue of O 56 r 1 of the Rules of the High Court 1980. To deny the plaintiff from proceeding with his vested right of appeal on extraneous grounds other than those prescribed in the order would tantamount to a fetter of the discretion of the appellate court to correct any error or impropriety on the part of the SAR. On the other hand, to construe otherwise will make a farce of the entrenched right of a litigant in seeking remedy through appeals and will definitely result in injustice. The plaintiff, therefore, should not be shut out from appealing against the said order by any other grounds other than those prescribed in O 56 r 1 of the Rules of the High Court 1980 (see p 259B–D).

[Bahasa Malaysia summary

Pada 30 Januari 1997, dalam ketidakhadiran plaintif dan peguamnya, penolong kanan pendaftar ('PKP') telah membuat satu perintah meminta plaintif supaya mendeposit ke dalam mahkamah jumlah sebanyak RM150,000 sebagai cagaran untuk kos, dalam tempoh 20 hari dari tarikh perintah dan mengarahkan bahawa semua prosiding dalam tindakan digantung sehingga deposit dibayar ('perintah tersebut'). Plaintif kemudiannnya memfailkan satu permohonan untuk mengetepikan perintah tersebut atau secara alternatif, untuk perintah digantung sehingga penyelesaian permohonan. PKP menolak permohonan tetapi melanjutkan tempoh untuk pematuhan selama 14 hari dan mengesahkan perintah tersebut. Isu permulaan adalah

sama ada mahkamah boleh terus mendengar rayuan memandangkan perintah yang dibuat oleh PKP yang tidak dipatuhi oleh plaintif. A

Diputuskan, menolak bantahan permulaan:

Plaintif mempunyai hak merayu yang terletakhak kepada hakim dalam kamar disebabkan A 56 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980. Untuk menghalang plaintif daripada meneruskan hak merayu yang terletakhak atas alasan yang tidak berkaitan yang lain daripada yang disyaratkan dalam perintah tersebut sama seperti membelenggu budi bicara mahkamah rayuan untuk membetulkan sebarang kesilapan atau ketidakwajaran pada pihak PKP. Untuk mentafsirkan sebaliknya akan memperolokkan hak kukuh seseorang litigan untuk memohon remedi melalui rayuan dan sudah tentu akan mengakibatkan ketidakadilan. Dengan itu, plaintif tidak patut dihalang daripada merayu terhadap perintah tersebut atas mana-mana alasan yang lain daripada yang disyaratkan dalam A 56 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat ms 259B–D).] B C D

Notes

For a case on right of appeal to High Court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 642. E

Legislation referred to

Rules of the High Court 1980 O 56 r 1

SA Ponmugam and *Adian Maniza Mohd Zain* (*Ponmugam & Co*) for the plaintiff.

Eric Clement (*Siva Thurai Mariany & Co*) for the defendant. F

Mohd Noor Ahmad J: The preliminary issue in this appeal by the plaintiff is whether I can proceed to hear the appeal in the face of the order made by the learned senior assistant registrar ('the SAR') on the security for costs which the plaintiff had not complied with. G

On 30 January 1997, in the absence of the plaintiff and his counsel, the SAR made an order requiring the plaintiff to deposit into court a sum of RM150,000 as security for costs, within 20 days from the date of the order and directed that all proceedings in the action be stayed until the deposit is made ('the said order'). On 5 February 1997, the plaintiff filed an application to set aside the said order or in the alternative, for the said order to be stayed until the disposal of the application. On 18 February 1997, the SAR dismissed the application but extended the period for compliance for another 14 days from that date and confirmed the said order. The SAR based his decision on the following grounds: H

(i) no merit or reasonable explanation for the absence of the plaintiff and his counsel on 30 January 1997 was given; I

(ii) the said order was made on the merits of the case; and

(iii) the sum of RM150,000 was reasonable.

A My view is that, notwithstanding the merits of the appeal which will be decided at the hearing of the appeal proper, I can proceed to hear the appeal even though the plaintiff had not complied with the said order for the reason that the hearing of the appeal to the judge in chambers is in law a rehearing of the application. The said order does not bind this court even though the plaintiff had not complied with the said order. The plaintiff has
B a vested right of appeal to the judge in chambers by virtue of O 56 r 1(1) of the Rules of the High Court 1980, subject to compliance with the requirements of the procedure laid down in rr 1(2), (3) and (3A) of the order. To deny the plaintiff from proceeding with his vested right of appeal on extraneous grounds other than those prescribed in the order such as in
C this case, for non-compliance with the order for security for costs, would tantamount to a fetter of the discretion of the appellate court to correct any error or impropriety on the part of the SAR. To construe otherwise will make a farce of the entrenched right of a litigant in seeking remedy through appeals and will definitely result in injustice. In short, the plaintiff should not be shut out from appealing against the said order by any other
D grounds other than those prescribed in O 56 r 1 of the Rules of the High Court 1980.

Therefore, the answer to the question is in the affirmative. Hence, the preliminary objection is dismissed with cost.

E *Preliminary objection dismissed.*

Reported by David Lai

F

G

H

I